United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1026

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P/S

To be argued by
JOSEPH E. BRILL

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1026

UNITED STATES OF AMERICA,
Appellee,

—*vs.*—

FRED J. ZEEHANDELAAR,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

Questions Presented For Review

1. Did the Trial Court improperly permit an amendment of the indictment which materially changed the substance, theory and text of the allegations of perjury?

2. Was it an abuse of the grand jury process for the prosecutor to refuse a pre-indictment request by the defense that the grand jury be advised that a prior grand jury, a few days earlier, had voted a "no true bill"? Was the error compounded by the refusal of the Court, in the exercise of its supervisory jurisdiction, when requested by the defense, to so direct the prosecutor? Did these errors require a dismissal of the indictment?

3. Did the text of the indictment effectively conceal from the grand jury the fact that the defendant's testimony had been edited, and did that editing distort the substance of the actual testimony? Was the grand jury indictment, both as filed and as amended, so confused and ambiguous in its specification of perjury that its dismissal was required?

4. Was the defendant denied a fair trial when the prosecution was permitted to effectively retry the merits of the prior case at the instant trial and to advise the jury that the allegedly perjurious testimony had been given by the defendant when he was a defendant in a criminal trial?

5. Was the defendant deprived of a fair trial by comments of the prosecutor, in summation, which placed his own credibility in issue and which vouched for the credibility of prosecution witnesses?

6. Within the context of this perjury prosecution, did the District Court exceed its authority when it directed that, as a condition of probation, the defendant must pay $5000 to the Department of Interior for use in connection with preservation of Endangered Species?

Preliminary Statement

Fred J. Zeehandelaar appeals from a judgment of conviction entered against him on January 3, 1975, after a jury trial before the Honorable Robert J. Ward, in the United States District Court for the Southern District of New York.

An earlier Indictment, 72 Cr. 1328, containing two counts, was filed on December 6, 1972. Count I charged that, on February 7, 1972, the defendant had violated 18 U.S.C. § 1001 by submitting a letter containing false statements to the Department of Interior, Bureau of Sport Fisheries and Wildlife. Count II charged that the defendant violated the same statute by submitting an application on June 8, 1972 to the same Bureau for a permit to import twenty (20) live cheetahs into the United States. Trial of the indictment was assigned to the Honorable Robert J. Ward. Prior to trial, Judge Ward dismissed Count I upon the ground that it did not state facts sufficient to constitute an offense against the United States. Thereafter, the defendant was convicted, following a jury trial, and an appeal was taken to this Court. This Court reversed the conviction upon the ground that the indictment failed to contain a sufficient statement of the essential facts constituting the offense charged, resulting in "substantial uncertainty . . . which pervaded the trial and the deliberations and verdict of the jury . . ." *United States* v. *Zeehandelaar*, 498 F.2d 352 (2d Cir. 1974). (The text of this Court's opinion is reproduced at A. 13).[1]

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[1] References preceded by "A." are to the Appellant's Appendix filed in this Court with respect to the instant appeal. References preceded by "B." are to the Appendix filed in this Court with respect to the appeal of indictment 72 Cr. 1328. The second count of that indictment is reproduced at B. 7, and the Trial Court's dismissal of the first count appears at B. 33-34.

On September 27, 1974, the Government sought a superseding indictment, from the *September*, 1974 grand jury, charging the defendant with the violation previously charged and, in a second count, with having given perjurious testimony at the first trial. The grand jury refused to indict and voted a "no true bill."

On October 1, 1974, the Government re-presented the case, but to a different grand jury—the *October*, 1974 grand jury. The grand jury returned an indictment which was filed on October 2, 1974.

The superseding indictment was in two counts (A. 5). Count I charged that on June 8, 1972 the defendant had submitted an importation application and other documents to the Bureau of Sport Fisheries and Wildlife in which he falsely claimed that a certain letter and a certain check had been written on January 17, 1972. The second count charged that certain testimony given by the defendant at the trial of the prior indictment had been perjurious.

Prior to trial, and upon motion of the defense, the Trial Court ordered a severance of the two counts and directed that the parties proceed to trial as to the perjury count (A. 311-12). Defense motions for a dismissal of the perjury count were denied.

Also prior to trial, and over the objection of the defense, the Court directed that certain portions of the specifications of perjury be stricken from the indictment as being immaterial surplusage (A. 341). The trial proceeded upon the basis of an amended indictment (A. 9).

The jury returned a verdict of guilty as to the perjury count, and, on January 3, 1975 the Court entered judgment against the defendant as follows:

> "Imposition of sentence is suspended. Defendant is placed on unsupervised probation for a period of one (1) year upon condition that he pay $5000 to the

Department of Interior which shall be used in connection with preservation of Endangered Species, payment to be arranged by probation department.

"In the event an appeal is filed, probation is stayed pending such appeal.

"Count I is dismissed on motion of the Government made pursuant to Rule 48(a) F.R.Cr.P." (Judgment, A. 1302; to the same effect minutes of sentence at A. 1294-9).

A notice of appeal to this Court was timely filed (A. 1315).

Statement of Facts

A. The Prior Prosecution *

Fred J. Zeehandelaar is an importer of wild animals, highly respected by zoologists and others who have expertise in the field (B. 262-286, 927).

In December, 1971, there existed a belief that the Department of Interior, Bureau of Sport Fisheries and Wildlife [hereinafter, respectively, "The Department" and "The Bureau"] might soon place the cheetah on the Endangered Species List. If that eventuality were to come about, importation of cheetahs would no longer be permitted except in instances of economic hardship such as where it could be shown that there was a pre-existing importation contract, or if the importation was for the purpose of propagation. (A. 14-15).

In early January, 1971, Zeehandelaar received and confirmed an order for twenty cheetahs to be delivered to a

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* The facts of the prior prosecution are set forth at some length in this Court's opinion which reversed the defendant's conviction, *United States* v. *Zeehandelaar*, 498 F.2d 352 (2d Cir., 1974). Citations to the facts of the prior trial, will, therefore, be to this Court's opinion which is reproduced at A. 13-19.

wild animal preserve, Wild Kingdom, Inc., in Orlando, Florida. (A. 14).

On February 3, 1972, the Secretary of the Interior published in the Federal Register a Notice of Proposed Rule-Making which declared the Department's intention of placing the cheetah on the Endangered Species List. Permits are not generally issued unless an importation contract has been entered into prior to the publication date. (A. 14-15). On March 30, 1972, the cheetah was officially placed on the list and its importation was prohibited except in those situations where there had been a pre-publication contract or where the purpose of importation is scientific or propagational. (A. 14-15).

On June 8, 1972, Zeehandelaar applied for an importation permit and attached to his application two documents which he has since admitted were backdated. Although the application was withdrawn in October, 1972, Zeehandelaar was indicted on December 6, 1972 upon the charge of making false statements to the Department of Interior (18 U.S.C. § 1001). Since it was never clear whether the indictment charged him with falsely stating that he had a bona fide pre-publication contract (which he clearly did have) or with falsely submitting backdated documents, this court ruled that the indictment was defective and reversed the defendant's conviction. (A. 15-16).

B. The Instant Prosecution *

The defendant testified in his own behalf at the prior trial. Ironically, the testimony alleged by the present indictment to have been perjurious, did not concern any fact placed in issue by the prior indictment. Instead, it involved the Government's attempt to prove under the "sim-

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* So as to avoid undue repetition, the facts relating to the manner in which the instant indictment was procured and the amendment of that indictment by the Court, are set forth under Point I of our argument, *infra*, pp. 11-20.

ilar act" theory that on a different occasion, unrelated to the facts of the indictment, the defendant had offered to backdate a contract for the purpose of circumventing the importation prohibition. This Court described that controversy as follows:

> "On March 30, 1972, the cheetah was officially placed on the Endangered Species list and its importation was prohibited. Melvin Lovell, a Government witness testified that shortly thereafter, on April 15, he met with Zeehandelaar for about fifteen minutes at the Arizona Inn, in Tucson, Arizona, and was told that although importation of the cheetah had been banned, 'we could backdate the order' and thereby come within the economic hardship exception for cases involving pre-existing contracts.
>
> "Zeehandelaar denied categorically that any such meeting had taken place. Instead, he testified to a telephone call from Lovell, during which the latter broached the question of backdating, to which Zeehandelaar responded: 'Sorry, that can't be done.' In rebuttal, the Government called Frank Gilbert and Suzanne Pressman. Gilbert testified that he had been present in Tucson when Zeehandelaar met with Lovell and he corroborated Lovell's account of his conversation. Suzanne Pressman, an employee of the Humane Society of the United States, also corroborated Lovell's testimony, although she had not been present and had only heard about the meeting with Zeehandelaar second-hand from Lovell later in the day on April 15 while riding in an automobile with Lovell, Gilbert, and their wives".*

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* In its opinion reversing the defendant's conviction, this Court found it to be additional reversible error that the Trial Court had permitted Miss Pressman's testimony to go to the jury as substantive evidence of the alleged contents of the Zeehandelaar-Lovell-Gilbert conversation (A. 18).

It would serve no purpose, within the context of the arguments presented by this brief, to detail the inconsistencies and vacilations of the testimony of Lovell (A. 498-684), Gilbert (A. 685-758) and Pressman (A. 993-1041). It will suffice to present their basic stories.

Melvin Lovell testified that, in April, 1972, he and his wife, together with Frank and Amanda Gilbert were interested in acquiring a pair of cheetahs for the purpose of propagation (A. 502-505, 538). On April 14, 1972, Lovell, alone, had a private conversation with Earl Baysinger, the Acting Chief of the Office of Endangered Species and International Activities of the Service. Baysinger recommended Zeehandelaar as an appropriate person through whom the cheetahs could be imported from Southwest Africa (A. 507, 546, 820, 848).

On the following day, April 15, 1972, Lovell, who had never met Zeehandelaar, left a message at Zeehandelaar's New York office. Coincidentally, Zeehandelaar was then attending a conference of zoo directors in Tucson, Arizona, and Lovell resided in Phoenix, Arizona. (A. 508-509).

According to Lovell, Zeehandelaar returned the call later that day, and the entire conversation was as follows:

> "I introduced myself, I told him that I had been told he was an animal importer, dealer, and that I was interested in obtaining a pair of cheetahs, and I wanted to talk to him about this. And Mr. Zeehandelaar told me he would be in and out, but that if we were down in Tucson he could probably meet with us." (A. 511).

Later in the day, Lovell allegedly communicated this information to Gilbert, and they and their wives and another couple set out for Tucson (A. 511-514). Upon their arrival at the Arizona Inn, where Zeehandelaar was staying, Lovell

allegedly called up to Zeehandelaar's room and announced he was waiting in the hotel lounge. (A. 514-6). While in the lounge, Lovell's group was seated around a table and was joined by Sue Pressman, an employee of the Humane Society of the United States (A. 517-8).

Thereafter, Pressman saw Zeehandelaar coming toward the lounge area and identified him to Lovell. Lovell and Gilbert then rose, went to Zeehandelaar, and invited him to sit with them at a table apart from the remainder of the group. (A. 519-20).

During the brief conversation which ensued, Zeehandelaar allegedly suggested that due to the importation restrictions, the only way he could secure two cheetahs for them would be to take them from a pre-existing order that was coming into the country for an organization called Lion Country Safari, or to backdate a new order so as to make it appear that it had been written prior to the effective date of the importation restriction (A. 521). Lovell allegedly rejected the proposal, and all contact with Zeehandelaar was terminated (A. 522).

Frank Gilbert, who also testified in behalf of the government, only recalled that the meeting occurred, but could not recall any offer by the defendant to backdate an order or to take animals from a different order. He did recall that the defendant was in a rush to get to another meeting (A. 698-712).

Sue Pressman, who did not overhear the conversation, claimed that Lovell later said to her, "What's the idea of sending us to a fellow like that? He just made an illegal offer. If we weren't supposed to have the cheetahs, why didn't he just say so?" (A. 1003). She recalled, "it was something to do with backdating a document or a check." (A. 1003).

Earl Baysinger, of the U.S. Fish and Wildlife Service, testified with respect to the regulations of the Department of Interior and with regard to his recommendation of Zeehandelaar to Lovell (A. 820, *et seq.*).

During the course of the presentation of the Government's case, there was read to the jury a substantial portion of the defendant's testimony at the prior trial, much of which concerned only his response to the charges of the prior indictment (A. 952, *et seq.*).

The defense case included the testimony of Zeehandelaar's secretary who had taken Lovell's telephone message (A. 1064, *et seq.*). Additionally, and in contradiction of Lovell's testimony, an official of Lion Country Safari testified that his organization had never placed an order for cheetahs with the defendant (A. 1080, *et seq.*). An effort to present character evidence was aborted by a Court ruling that the government would be permitted to question such witnesses as to their knowledge of the prior indictment. (A. 760, *et seq.*).

ARGUMENT

POINT I

The defendant's right to be tried only upon the charges of a grand jury indictment was violated by: 1) the deceptive and misleading manner in which the indictment was drafted for presentation to the grand jury; 2) the failure of the government to advise the grand jury that a prior grand jury had voted a "no true bill"; and 3) the trial court's amendment of the indictment, at the request of the prosecution.

A. The Refusal of the Grand Jury to Indict

This Court reversed the defendant's prior conviction on May 15, 1974 (A. 13). Thereafter, the Government continued proceedings in this case under the prior indictment, notwithstanding the fact that this Court had declared that indictment to be fatally defective due to its failure to provide a plain, concise and definite statement of the essential facts constituting the offense charged (A. 17-18).

In or about late July, 1974, while attempting to secure a guilty plea from the defendant under the defective indictment, government counsel threatened that, in the absence of such a plea, ". . . a superseding indictment containing a perjury count would be sought if a retrial proved necessary." (A. 54). It is clear, therefore, that the government had made a determination in this regard long before it actually presented such a charge to the grand jury.

On September 30, 1974, the parties appeared in court, and the prosecutor advised the Court that on the prior Friday (September 27, 1974), more than four and one-half months after the reversal, the case had been presented to the September, 1974 grand jury, and the grand jury had

refused to indict. He further stated that the government intended to present the case to the October, 1974 grand jury (A. 127-133, 169).

Defense counsel requested that, if such a presentation should occur, the new grand jury should be advised of the fact that the prior grand jury had voted a "no true bill". The trial court declined to so direct the government, stating that it was a decision for the prosecutor to make (A. 141-142, 145).

The parties returned to Court on October 4, 1974, and the prosecutor revealed that a superseding indictment had been filed on October 2, 1974 (A. 155). The Court denied a defense request for an opportunity to examine the minutes of both presentations (A. 167-177), but eventually ordered that the grand jury minutes be, respectively, marked Court's Exhibits 1 and 2 (A. 235).* The defense was granted leave to file written motions addressed to the indictment. We respectfully request this Court to examine those exhibits.

B. The Allegedly Perjurious Testimony

While under direct examination at his first trial, the defendant was questioned with regard to the telephone conversation he had with Melvin Lovell on April 15, 1973, when he called Lovell in response to the message that Lovell had left with the defendant's secretary in New York (*supra*, pp. 7, 8, 10).

The specification of perjury charged in the indictment sets forth an edited version of the actual testimony. Indeed, the fact that it was edited is not apparent from an examination of the indictment (A. 6).

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* The exhibits in question have been sealed by the trial court.

As will hereinafter appear, prior to trial, the trial court, at the request of the prosecutor and over the objection of the defense, redacted the testimony specified in the single perjury count by striking the first ten paragraphs, constituting three questions and three answers.

For purposes of demonstration, we shall now set forth the testimony as it appears in the transcript of the first trial. The material omitted in the superseding indictment's version of the testimony is contained in brackets. The material stricken by the court is in plain face type, and the material which remained in the amended indictment is italicized. (B. 336-341; A. 6; A. 9).

"Q. Whom did you phone and what number did you call?

[*"A. I telephoned Mr. Lovell at this number, 6—area code 602—937-6330.*]

"Q. And what conversation did you have with him?

[*"A. I introduced myself. I said, 'Mr. Lovell, I have just been advised that you called my office and you told my office this same message'—and I repeated the same contents—'I am calling you back. What can I do for you?'*

[*"And he then said—do I continue?*

[*"The Court: The entire conversation, if you would.*

[*"A. He then said "What is the approximate price?'*

[*"And I said "The approximate price is between' —as I recall at this moment—'17 and $1900 each delivered to the United States.'*

[*"He then said again 'I visited U.S.D.I. yesterday and gave the same story.'*

[*"I then questioned his qualifications to obtain what he described to be a zoological import permit.*

[*"I told him that a zoological import permit,*

which is not the same as a commercial import permit, would require certain qualifications, facilities, et cetera, et cetera, facilities, housing, for the U.S.D.I. to grant him such a zoological import permit.

[“He then said that he was already aware of such possibility of not being qualified for such zoological permit.]

“He then asked me whether there was any other way of getting cheetahs, of a different kind of a permit.

“I then told him that it was my intention to apply for a commercial permit for twenty cheetahs for Wild Kingdom in Orlando, Florida, later in the summer.

“I told him also that it is the privilege of the permittee, in this case the permittee of the commercial permit, to ask if the permit has been issued, request permission for whatever reason there might be——

“Q. From whom?

“A. From U.S.D.I. From U.S.D.I., for whatever reason it might be a year later, six months later, to sell one or more of the permitted animals, in this case cheetahs, to somebody else.

“That privilege is printed on the permit.

“I told him also——

“Q. *What is the substance of the information?*

“A. *I told him also that I didn't consider such permission to be likely to be given to me after I had the Kingdom permit because I would have to provide a contract or an order for Mr. Lovell, entered into for whatever he wanted, prior to the effective date that the cheetah was placed on the Endangered Species list.*

“Since we didn't have such a contract, since he didn't and I didn't have such a contract, I told him it was unlikely that such permission, after I received the permit of, let's use the word, switching animals, would be granted.

"He then asked me what if I sign a contract dated in March. And I said 'Sorry, that can't be done.'

["The conversation ended by me telling him that since he is in Phoenix, and identified myself as being in Tucson, Arizona, which is only sixty-five miles, seventy miles away, I advised him that I would be on the program in the Phoenix Zoo on an organized tour on Tuesday, April 18, and I suggested to him that if he wants to talk to me again he might take the opportunity of looking me up while we were at the Phoenix Zoo.

["That was the end of the conversation.

"Q. The telephone conversation?

"A. The telephone conversation.] [1]

"Q. *Did you ever state to Mr. Lovell that there were two ways he could get a cheetah through you, and then did you say to him that one way was that you had an order of cheetah coming in for Lion Country Safari and that you could siphon off two animals from that order for them or you could date back the order? Did you ever say that in substance or in words?*

A. *No, sir.*"

---

[1] At this point in the testimony at the first trial, there ensued two and one-third pages of questions and answers with regard to the defendant's claim that Lovell and Gilbert unsuccessfully attempted to converse with the defendant at the Arizona Inn and that the defendant rushed off to catch a chartered bus which was going to the Phoenix Zoo. Significantly, the indictment, itself, does not contain that testimony and does not indicate that anything has been edited out of the transcript. The text set forth in the indictment, therefore, makes it appear as though the final question and answer had reference to the content of the telephone conversation.

C. Melvin Lovell's Grand Jury Testimony

On October 1, 1974, Lovell testified before the grand jury which returned the instant indictment (Government Exhibit 3502, A. 1304).

Lovell's entire grand jury testimony, as to the telephone conversation in question, was as follows:

> "I called him down there, at the Arizona Inn, looking for Mr. Zeehandelaar, and he returned my call, and I told him that we were interested in getting a pair of cheetah.
>
> "We wanted to talk to him about the price and the permit and all this other stuff.
>
> "He said that if we came down to Tucson, he would meet with us. (A. 1307)
>
> * * * * *
>
> "Q. And you stated that you had a conversation with Mr. Zeehandelaar, I believe, and you stated it was the day after you returned from Washington. Would that make it April 15, 1972? A. Yes.
>
> Q. And you arranged at that conversation to meet him in—— A. Tucson.
>
> Q. At the Arizona Inn? A. Right.
>
> Q. Did you discuss anything else in that conversation? A. On the telephone?
>
> Q. Yes. A. No. I told him we wanted to talk to him about—well, that we were trying to get a pair of cheetah in our permit application. Other than that, that was the only thing we talked about on the telephone." (A. 1308).

Lovell's grand jury testimony goes on to allege that he, Gilbert, their wives and another couple traveled to the Arizona Inn and sat at a table until the defendant entered the room. When the defendant was pointed out to them,

Lovell and Gilbert went over to him, and the three men sat down at a table some distance from the remainder of the group. Significantly, after being excused by the grand jury (A. 1312), Lovell was recalled and was asked to explain why he and Gilbert sat down with the defendant at a table separate and apart from the remainder of the group. He responded:

> "None other than there was quite a collection of people, as you can appreciate, seven or eight people sitting around the table, all talking. We felt it would be far easier to have our little discussion or conversation away from the crowd." (A. 1313)

Based upon the manner in which the indictment was drawn (See fn. at p. 15, *supra*), it may well be that the grand jury believed Lovell's version of the *telephone* conversation, but disbelieved his version of the meeting at the Arizona Inn. A fair reading of the testimony quoted in the perjury count necessarily leads to the conclusion that the defendant is charged with perjuring himself as to the contents of that telephone conversation.

D. The Pre-Trial Motions

By written motions (A. 21), the defense moved, *inter alia*, for a dismissal of the indictment upon the ground that: 1) the prosecutor had failed to advise the indicting grand jury of the refusal of the prior grand jury to indict; 2) the manner in which the government had edited the defendant's actual testimony for inclusion in the indictment constituted a concealment of the true facts from the grand jury; and 3) the version of the testimony included in the indictment left the defense unable to determine what portions of the defendant's testimony were claimed to be perjurious.

In a written response, government counsel acknowledged the truth of the last of these complaints and proposed a remedy as follows:

> "Defendant has moved to dismiss Count Two of the indictment on the ground, *inter alia*, that it is deficient in certain technical respects. One of those respects is that the indictment does not sufficiently identify that portion of this testimony quoted in Count Two claimed to be false. In drafting the indictment, certain prefatory material was included in the belief that it would make clearer that portion of defendant's testimony that was materially false. In light of defendant's motion the government now realizes that this has not happened and consents to dismiss the first 10 paragraphs of quoted testimony as 'surplusage'. A copy of the indictment redacted in the suggested fashion is annexed hereto as Exhibit E. As is explained more fully in the government's memorandum of law, the redacted indictment should eliminate any question defendant may have had concerning which portion of his testimony is deemed to be false.

The memorandum of law submitted with the government's response further explains the government's amendment theory:

> "* * * The substance of what remains [after the amendment] is that the defendant told the government's two witnesses that he could not help them unless they had had a contract with him prior to March 30, 1972, and that they then asked him to backdate a contract to before that date, which he refused to do. It is this testimony the government claims is false. Viewed in light of the foregoing, defendant's first point no longer (if it ever did) has any merit.

> "The portion of Count Two remaining after the 'surplusage' has been struck joins two statements made by defendant on the same subject at slightly separate times in his direct testimony. See the transcript of the first trial, pp. 337-338 and 341. The intervening material was irrelevant and was eliminated so as to make that portion of defendant's testimony which the government believed false absolutely clear. This type of recomposition is entirely proper and does not invalidate an indictment. * * *" (A. 104).

In a written reply, the defense rejected and opposed the government's offer to amend the indictment, arguing that such material cannot be treated as "surplusage" and that no warrant exists under law for such an amendment. (A. 113).

Upon the oral argument of the motions, the prosecutor first addressed himself to the propriety of the presentation to a second grand jury. It appears that the chief distinction between the two presentations was that, in the first, Lovell's prior trial testimony had been read to the grand jury, whereas, in the second, he had testified personally. In both instances, the text of the indictment tendered to the grand jury was identical (A. 207-209, 222). The prosecutor further advised the Court that the government had rejected the thought of advising the second grand jury as to the fact that a prior grand jury had voted a "no true bill":

> "With the greatest respect to the Court, we eventually determined that a grand jury has an obligation to be impartial, and that it should be impartial in all respects. Advice to a grand jury as of what an earlier grand jury had done, or for that matter of what a petit jury has done, can abridge

its impartiality and intrude into the realm of the grand jury." (A. 208-209).*

After reading the grand jury minutes, the Court denied the various defense motions which were predicated upon the grounds stated *supra*. (A. 235). Additionally, after hearing extended defense opposition to an amendment of the indictment (A. 224-236; 328-344), the Court granted the government's motion to amend the indictment by striking the first ten paragraphs (A. 341). During the course of the argument, the government contended that the stricken matter was "immaterial", and it explicitly so stated in its bill of particulars (A. 227, 230-1, 328-9). The defense argued that, if such be true, it is a further ground for dismissal of the indictment since the grand jury has improperly been presented with specifications of perjury containing concededly immaterial matter (329). That motion was also denied.

In the course of granting the prosecution's motion, the Court noted:

> "I want there to be no prejudice and no undue confusion presented to this jury. I think in its present form the count will engender a certain amount of confusion.
>
> "Now it may be that the defense feels that confusion is in the interest of the defendant——
>
> "Mr. Brill: Not at all, sir.
>
> "The Court: —if that is the case, I would suggest that in the interest of justice at this point, since we are going to trial before a trial jury, require redaction. * * *" (A. 333-4).

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* In this regard, it is significant that the trial court rejected the defense contention that the grand jury had been misguided by the government's presentation to it of an indictment containing a version of the defendant's testimony which did not reveal it to be edited; but, in ordering the amendment of the indictment, "in the interests of justice", held that the indictment, as originally returned, would engender confusion on the part of the trial jury.

E. Analysis

We have set forth *supra,* at pp. 13-15, the defendant's actual trial testimony from which the specification of perjury was taken. By means of brackets, we have demonstrated the manner in which the testimony was edited for inclusion in the indictment upon which two grand jurys voted, one of which returning a "no true bill". By failing to indicate that anything had been edited out of the defendant's testimony, the government made it appear as though that testimony simply concerned a telephone conversation. We respectfully urge this Court to read the specification of perjury, as contained in the indictment (A. 7-8). From such a reading, one would never know that there was a conversation at the Arizona Inn.

It will be recalled that the telephone conversation was only with Lovell. As the Government, itself, contended in its written response to the defendant's motions (*supra*, pp. . . . .), the proposed amendment was geared to alter the ambiguity of the indictment with the purpose of shifting the focus to the later *meeting* of the defendant with Lovell *and Gilbert*. There was thus presented the situation of an already deceptive indictment being made more deceptive by means of amendment. From a reading of the redacted indictment, one would never know that there had been a telephone conversation.

The shift in focus accomplished by the redacted indictment, away from the telephone conversation and to the Arizona Inn conversation, is overwhelmingly demonstrated by its clear effect upon both the Trial Judge and the trial jury:

(1) It will be recalled that Frank Gilbert was unable to recall the substance of the conversation at the Arizona Inn. He had not been a party to the telephone conversation. Nevertheless, over defense objection, the prosecutor was per-

mitted to read to Gilbert the first answer of the redacted indictment, which concerned only the telephone conversation.* The Court explained its ruling by stating to the prosecutor: "* * * I will permit you to inquire of the witness whether Zeehandelaar on April 15, 1972 made those statements." (A. 709).

(2) in marshalling the evidence as to Lovell's trial testimony, the Court completely omitted any reference to Lovell's denials of Zehandelaar's version of the telephone conversation (Lovell's testimony at 454-5; Court's charge at A. 1178-9);

(3) in reading the redacted version of the indictment to the jury, during the course of the charge, the Court failed to indicate that the first question and answer unequivocally related only to the telephone conversation (A. 1193);

(4) shortly after retiring to deliberate, the trial jury requested and received a copy of the redacted indictment;

(5) both requests of the trial jury for the reading of testimony were limited to occurrences at the Arizona Inn (A. 1224, 1234).

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* Q. Mr. Gilbert, directing your attention back to this conversation you had with the defendant in the Arizona Inn I ask you did the defendant ever state to you in words or substance the following "I" referring to defendant "told him also that I didn't consider such permission to be likely to be given to me after I had the Kingdom permit because I would have to provide a contract or an order for Mr. Lovell, entered into for whatever he wanted, prior to the effective date that the cheetah was placed on the endangered species list.

"Since we didn't have such a contract, since he didn't and I didn't have such contract, I told him it was unlikely that such permission, after I received the permit of, let's use the words, switching animals, would be granted.

"He then asked me what if I sign a contract dated in March. And I said 'Sorry, that can't be done.'"

"A. I don't recall such conversation" (A. 711-712).

By redacting the indictment, the Court not only struck those questions and answers which may have prompted the grand jury to indict, but also shifted the thrust of the indictment from one conversation to another. Any reasonable interpretation compels the conclusion that the defendant was not, in fact, tried upon the indictment returned against him by the grand jury.

F. The Government's Abuse of the Grand Jury Process Required a Dismissal of the Indictment.

The grand jury is interposed "to afford a safeguard against oppressive actions of the prosecutor or a Court." *United States* v. *Cox*, 342 F.2d 167, 170 (5th Cir.), *cert. denied*, *sub nom Cox* v. *Haubert*, 381 U.S. 935 (1965). The content of the charge, as well as the decision to charge at all, should be entirely up to the grand jury:

> " ** * since it has the power to refuse to indict even where a clear violation of law is shown, the grand jury can reflect the conscience of the community in providing relief where strict application of the law would prove unduly harsh." (8 Moore's Federal Practice, 6.02[1] Cipes Edition, 1968).

The practices followed in the present case, make a mockery of the fifth amendment requirement and of the grand jury. While we do not question the right of a prosecutor, in appropriate circumstances, to re-present evidence for the purpose of securing an indictment, it should certainly be the prosecutor's obligation to advise the new grand jury that a former grand jury had voted a "no true bill." As noted, *supra*, pp. 19-20, the failure of the government to candidly inform the grand jury was a considered determination rather than an oversight. We respectfully submit that it was grievous error, requiring a dismissal of the indictment. We further submit that the refusal of the Trial Court to order the government to make such a disclosure was an abdication of the responsibility of the Court flowing

from its general supervisory powers with regard to the conduct of the grand jury.

The wording of the specification of perjury in the indictment, itself, constituted an even more substantial and clear fraud upon the grand jury. It mislead the grand jury into believing that it was indicting with respect to the testimony concerning one conversation, although it was the prosecutor's intention, as revealed by his later, successful motion to amend the indictment, to prosecute the defendant based upon a different conversation. Whatever description is given to this state of affairs, it far surpasses the "confusion" that required a reversal of the prior conviction.

In reversing the defendant's original conviction, this Court said:

> "Rule 7(c) of the Federal Rules of Criminal Procedure provides that an indictment should contain 'a plain, concise, and definite written statement of the essential facts constituting the offense charged.' The rule reflects the oft-stated principle that an indictment is defective if it fails to apprise the accused 'with reasonable certainty, of the nature of the accusations against him.' [Footnote and citations omitted]. The indictment here clearly failed to do so." (*United States* v. *Zeehandelaar*, 498 F.2d 352 at 356; A. 17).

This Court further noted:

> "An indictment drawn with reasonable certainty assures that the defendant will not be tried or convicted for an offense other than the one for which he was indicted by the grand jury, that the defendant will be able to prepare an adequate defense and to address himself to the relevant questions of fact and law, that the Trial Court will be able to

> determine that the jury's verdict rests on substantial evidence, that an appellate court's affirmance will not be for a crime other than the one for which defendant was convicted, and that the defendant will not face the prospect of being placed twice in jeopardy. *See generally*: *Russell* v. *United States*, 369 U.S. 749 (1962)." (498 F.2d at 356, fn. 1; A. 17).

It is incredible that, faced with such a specific admonition from this Court, within the context of the present prosecution, the government saw fit to play fast and loose with the wording of the indictment in a manner which must have misdirected the grand jury. We respectfully submit that the government's conduct in doing so and in failing to advise the grand jury of its prior effort to obtain an indictment, constituted a fraud upon the grand jury and required a dismissal of the indictment.

In a line of cases concerning the presentation of hearsay evidence to the grand jury, this Court has held that if the grand jury is mislead as to the fact that material evidence presented to it was hearsay, an indicted defendant is entitled to a dismissal of the indictment upon the ground that his fifth amendment right to indictment by a grand jury has been violated. *See*: authorities collected in *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir., 1972) and *United States* v. *Ramirez*, 482 F.2d 807 (2d Cir., 1973). It is clear that the basis for a dismissal of the indictment in those cases is not the mere use of hearsay, *Costello* v. *United States*, 350 U.S. 359 (1956), although excessive use of hearsay may well require the exercise of the supervisory powers of the federal courts, *United States* v. *Estepa*, *supra*, 471 F.2d at 1136; *see also*: the dissenting opinion of then Chief Judge Friendly in *United States* v. *Payton*, 363 F.2d 996, 1000 (2d Cir., 1966). The teaching of these cases is that an indictment cannot be permitted to stand if the government "whether wittingly or unwittingly" deceives the grand jury. *United States* v. *Estepa*, *supra*, 471 F.2d at 1137.

In *United States* v. *Estepa, supra,* this Court stated:

> "* * * when the framers of the bill of rights directed in the Fifth Amendment that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury,' they were not engaging in a mere verbal exercise." 471 F.2d at 1136.

It is respectfully submitted that the Government's lack of candor with the grand jury, its abuse of the grand jury process, and the resulting confusion of the indictment, itself, each required a dismissal of the indictment, and, for that reason, the conviction should be reversed.

G. The Amendment of the Indictment Was Constitutionally Impermissible and Deprived the Defendant of a Fair Trial.

Rule 6 (f) of the Federal Rules of Criminal Procedure provides:

> "An indictment may be found only upon the concurrence of twelve or more jurors."

Rule 6 (c) emphasizes the requirement that twelve jurors shall "find" each indictment by its provision that the foreman "shall keep a record of the number of jurors concurring in the finding of every indictment * * * ". The requirement of the Criminal Rules that every indictment must be "found" by at least twelve grand jurors is a further specification of the Fifth Amendment's command that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury * * * ."

The sweeping powers of the grand jury over the terms of the indictment entail very strict limitations upon the power of the prosecutor or the Court to change the indictment found by the jurors, or to prove at trial facts dif-

ferent from those charged in the indictment. Since the grand jury has unreviewable power to refuse indictment and to alter a proposed indictment, proof at trial of facts different from those charged cannot be justified on the ground that the same facts were before the grand jury and that the jurors might or even should have charged them.

Supreme Court decisions on amendment of the indictment support these principles as necessary inferences from the guarantee of indictment by a grand jury. In the leading case of *Ex parte Bain,* 121 U.S. 1 (1887), the defendant, an officer of a banking association, was charged with making a false report "with intent to deceive the *comptroller of the currency and* the agent appointed to examine the affairs of said association" (121 U.S. at 4; emphasis added). On motion by the government, the trial court ordered the italicized words struck out as surplusage. The Supreme Court set the conviction aside. In reply to the Trial Judge's argument, "that the grand jury would have found the indictment without this language," the Court stated:

> " * * * but it is not for the Court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument * * * [H]ow can it be said that, with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggest the changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer' may be frittered away until its value is almost destroyed." (121 U.S. at 9-10).

The Supreme Court has continued to adhere to the *Bain* principle in recent years. In *Stirone* v. *United States,* 361 U.S. 212 (1960), the grand jury charged a violation of the Hobbs Act. It found that the interstate commerce affected was the victim's shipment of sand from various other states to his plant in Pennsylvania. The Trial Judge allowed the Government to introduce evidence of interstate commerce other than that charged—i.e., the movement of finished steel from the victim's plant outward to other states. The Court set aside the conviction, holding that the proof at trial of these uncharged facts, amounted to an amendment of the indictment with respect to the element of interstate commerce. The Court relied on *Bain*, and quoted extensively from the passage set out above. The Court stated, *inter alia*:

> "The *Bain* case, which has never been disapproved, stands for the rule that a Court cannot permit a defendant to be tried on charges that are not made in the indictment against him." (361 U.S. at 217).

In *Russell* v. *United States,* 369 U.S. 749 (1962), the Supreme Court held that a bill of particulars cannot cure a fatally imprecise indictment. The bill of particulars only serves the function of appraising the accused of the charges and protecting him against future jeopardy, but it does not preserve his right to be tried on a charge found by a grand jury. The Court again cited the passage from *Bain* (369 U.S. at 770-1), referred to the "settled rule in the Federal Courts that an indictment may not be amended except by submission to the grand jury, unless the charge is merely a matter of form" (369 U.S. at 770) and stated:

> " * * * to allow the prosecutor or the Court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant

> could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him * * * " (369 U.S. at 770).

In *Bain, Stirone* and *Russell*, the Supreme Court has shown that it takes seriously and requires to be enforced rigorously, the Fifth Amendment's command that a defendant to a charge of "infamous crime" be tried only on "indictment of a grand jury." Similarly, the lower Federal Courts have made clear that an amendment in the substance of an indictment will not be tolerated. *United States* v. *Dodge*, 258 F. 300, 305 (2d Cir. 1919); *United States* v. *Consolidated Laundries*, 291 F.2d 563, 571-2 (2d Cir. 1961); *United States* v. *Cirami*, — F.2d — (2d Cir. January 24, 1975), September Term, 1973, Slip Sheets Opps. 6047 at 6050-6052; *United States* v. *Gammil*, 421 F.2d 185, 186 (10th Cir. 1970); *Carney* v. *United States*, 163 F.2d 784 (9th Cir. 1947); *Edgarton* v. *United States*, 143 F.2d 657 (9th Cir. 1944); *United States* v. *Critchley*, 353 F.2d 358 (3d Cir. 1965); *United States* v. *Anzelmo*, 319 F. Supp. 1106, 1125-6 (E.D. La. 1970); *United States* v. *Williams*, 412 F.2d 625 (3d Cir. 1969); *Horsley* v. *Alvis*, 281 F.2d 440 (6th Cir. 1960).

Although the government persisted in its contention that the stricken testimony was false, both the government and the Court justified the redaction upon the theory that the stricken testimony was "immaterial" and would produce "confusion". Ironically, in amending the indictment, the Court relied upon *United States* v. *Goldstein*, 168 F.2d 666 (2d Cir. 1969). That case did not even involve the amendment of an indictment. There, one count of an indictment charged four specifications of perjury. The Trial Court appears to have charged the jury that in order to convict it had to find perjury as to each of the four specifications. Nevertheless, Goldstein argued on appeal that the evidence did not support a finding of per-

jury as to each of the four specifications, thus entitling him to an acquittal as to that count. This Court rejected that argument upon the following reasoning:

> " * * * even if, as a matter of law, the evidence did not support the verdict as to certificates 5, 6, and 7, it did as to 8. That is enough. The single count charged perjury as to four certificates, that is, made four assignments of perjury in one count. The appellant did not request the withdrawal of any specific assignment of perjury. Rather, he moved for a dismissal of the entire indictment both at the close of the Government's evidence and again at the close of all the evidence. That is not the equivalent of a request for a restricted submission. In the absence of such request and its denial, it is enough that one assignment in the count was adequately proved. *United States* v. *Mascuch*, 2d Cir., 111 F.2d 602, *cert. denied*, 311 U.S. 650." (168 F.2d at 671-2).

It is amply clear that the *Goldstein* principle is thoroughly inapposite to the issue of whether a perjury indictment may be amended without the consent of the defendant.

The Trial Court's theory appears to have been that the stricken questions and answers were immaterial (although, nevertheless, claimed by the Government to be false) and, could, therefore, properly be removed as long as a legally sufficient allegation remained. This Court had recent occasion to review the current state of the law as to that issue:

> "This Court has viewed *Bain* [*supra*] as holding that some deletions of unnecessary language may work an impermissible 'fundamental change' in the charge set forth in an indictment, even though a legally sufficient allegation remains. See *United States* v. *Colasurdo*, [453 F.2d 585, 590 (2d Cir., 1971)]. That type of change, involving the disregard of language that might well have had a sig-

> nificant bearing on the grand jury's decision to indict, may still violate the *Bain* rule. * * * " *United States* v. *Cirami, supra,* slip sheet opps. at 6052.

In *Cirami*, this Court went on to state that, in any event, *Stirone* v. *United States, supra,* ". . . interpreted *Bain* as standing for 'the rule that a Court cannot permit a defendant to be tried on charges that are not made in the indictment against him.' 361 U.S. at 217." id.

Whichever way the present status of the prohibition is interpreted, its violation in the present case cannot be disputed.

POINT II

The prosecutor was improperly permitted to retry the former false statement case within the context of this perjury prosecution for purpose of demonstrating that since the defendant, himself, had been on trial in a criminal prosecution, he was motivated to perjure himself.

The unfairness followed through and was expanded upon in the prosecutor's summation which repeated that theme, vouched for the credibility of prosecution witnesses, and commented upon the failure of the defendant to testify at the present trial.

The thorough emasculation of the defense was completed by a related ruling of the trial court which effectively prevented the defense from placing character evidence before the jury.

A. The Re-trial of the Prior Case

As filed, the indictment in this case was in two counts. Count I was, essentially, a re-statement of the accusation litigated at the first trial—the making of a false statement to the Department of the Interior (A. 6). Count II con-

tained the accusation of perjury (A. 8). Over the objection of the government (A. 253, 301-10, 319), the trial Court granted a defense motion for a severance of counts, and directed that trial proceed on the perjury count (A. 311-12).

It will be recalled that the subject matter of the perjury count was collateral to the issue which had been litigated at the prior trial. The defendant's alleged conversations with Lovell and Gilbert had nothing to do with the facts of the other case, but came into evidence solely for the purpose of showing a disposition on the part of the defendant to defraud the Department of the Interior. Nevertheless, under the guise of providing background to the jury, the government advised the Court that it wished to read into evidence a large part of the defendant's testimony concerning the charges of the prior indictment.* Defense counsel strenuously objected to the reading of such testimony, arguing that it was a prosecutorial effort to circumvent the severance order and to re-try the original case. He further contended that the only issue in the present case was whether the defendant had given false testimony concerning the incident described in the perjury count. To stray from that issue would not only confuse the jury, but would also violate fundamental due process (A. 371-6, 408-411).

Colloquy on the issue continued at some length, and when the Court attempted to limit the extent to which the government would be permitted to read such testimony into evidence, government counsel responded:

> "* * * the government feels quite strongly that, really, the heart of its direct case has been removed but respects Your Honor's decision on it.
>
> "I suspect that my prediction as to what will happen in this case will in fact happen. Once we

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* Government counsel described the extent of such testimony as follows: "It appears voluminous, but actually when you get through with the colloquys and everything else I would estimate it is perhaps just actual testimony of 150 pages" (A. 366).

call our one or two witnesses and rest, I think the defendant may call a character witness or two and will rest, and that will be the end of the case, and I think—" (A. 454-5).

Thereafter, when the government requested that the jury be advised that the allegedly perjurious testimony had been given in a criminal trial at which Zeehandelaar was the defendant, the Court ruled it would permit revelation of these facts. (A. 463-5). The defense strongly objected (A. 463-5).* Thus, in its opening to the jury, the government was permitted to advise the jury: "that earlier trial was also a criminal prosecution in which Mr. Zeehandelaar was the defendant" (A. 469), and that " . . . the issue of the defendant's intent was hotly contested at the first trial" (A. 470). A motion for a mistrial as to the latter comment was denied by the Court (A. 476).

After extended further colloquy throughout the trial as to whether and to what extent the government would be permitted to read the defendant's prior trial testimony into evidence, the Court ruled, over the objection of the defense, that the prosecution would be permitted to "read all of Mr. Zeehandelaar's direct and only those portions of the cross which Mr. Brill has agreed to" (A. 929-931). The defense pressed the point that the transactions involved in the first indictment were irrelevant to the perjury charges (A. 932). The colloquy continued through A. 951, and the prosecutor then proceeded to read the testimony to the jury.

Thus, over the continued objection of the defense, the prosecutor read, *in extenso*, from the defendant's testimony with regard to the subject matter of the prior indictment

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* This ruling is to be compared with the rationale of the Government's refusal to advise the Grand Jury that a prior Grand Jury had refused to indict (*supra*, pp. 19-20).

(A. 952-975).* Then the prosecutor read from the defendant's prior testimony with regard to the Lovell-Gilbert conversation (A. 977-985), and concluded with the defendant's testimony concerning his understanding of the Department of the Interior regulations (A. 986-7). Defense motions for a mistrial and for the striking of the testimony were denied (A. 989-992).

At the end of the government's case, the Court, again, formally advised the jury:

> "The Court takes and directs that you take judicial notice of the fact that Fred J. Zeehandelaar was the defendant in a case entitled United States of America v. Fred J. Zeehandelaar tried in late September, early October, 1973 before this Court and a jury.
>
> "On September 25, 1973 Mr. Zeehandelaar took the stand and was duly sworn. He gave testimony under that oath on September 25, 1973 and continued giving testimony under that oath on September 26, 1973 and on October 1, 1973" (A. 1061).

The Court noted the defendant's objection to its statement (A. 1062).

In his summation to the jury, the prosecutor argued that the defendant had a motive to lie, whereas the government's witnesses did not have such a motive because "they were not involved in the prior case. They were not the subject of investigation, and they were not the defendant" (A. 1146). He also pointedly noted, without any support in the record, that the government witnesses had "no criminal record, no prior involvement with the law". He repeatedly returned to the theme that the mere fact that the defendant on trial was a defendant in the prior case provided ample motive to lie (A. 1148, 1151).

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* The Court improperly required that the defense repeat its objections in the presence of the jury.

Additionally, the government, cleverly but unambiguously, drew the jury's attention to the fact that the defendant had not testified on his own behalf at the present trial:

> "The government submits to you that based on the credibility of the witnesses in this case, none of which was contradicted in any way whatsoever, and on the abundant motive and intent, it is clear beyond any doubt whatsoever that this defendant took the stand and swore falsely in front of the jury in the former case in which he was a defendant" (A. 1151).
>
> * * * * *
>
> "What was the version of what happened by the witnesses who testified here in front of you?" (A. 1132).
>
> * * * * *
>
> "So the case boils down to, really, do you believe these witnesses who testified here?" (A. 1142).

The prosecutor answered his own questions early in his summation:

> "*In truth* the defendant told these two gentlemen that he could siphon off or switch from another order.
>
> * * * * *
>
> "Secondly, *in truth,* the defendant offered to Lovell and Gilbert to join with them in the backdating of a contract for the importation of cheetahs so that they could avoid the regulations then lawfully in effect concerning the importation of these animals."
>
> (A. 1124). [Emphasis added]

Defense motions for a dismissal of the indictment, for a mistrial, and for a remedial instruction were all denied in all respects (A. 1146, 1154, 1164).

B. The Defendant was Improperly Prejudiced by the Revelation to the Jury that He had Previously Been Prosecuted for a Different Crime, and By the Use In Evidence of His Testimony Relating to the Offense Underlying that Prosecution.

The issue of materiality in a perjury prosecution is one of law and is determined solely by the Court. *Sinclair* v. *United States*, 279 U.S. 263, 298-9 (1929); *United States* v. *Marchisio*, 344 F.2d 653, 665 (2d Cir., 1965). In the present case, the Court instructed the jury that the allegedly perjurious testimony was material, and that they should not concern themselves with that element of the crime (A. 1195-6).

Of course, motive was not an element of the crime charged, and the Court so instructed the jury (A. 1202). Within the context of the present prosecution, intent was by no means an issue in the case. Not one item of evidence and not one argument of the defense was calculated to give the impression that the defendant's testimony had been an honest mistake or that he did not realize the nature of the oath he had taken. In short, the only real issue before the jury was whether the defendant had testified truthfully concerning a telephone conversation with Lovell and a meeting with Lovell and Gilbert. Neither of these events was related to the prior charge. They constituted only a collateral issue at the prior trial.

By placing before the jury the fact that the defendant had previously been prosecuted for and had denied an act similar to that which formed the subject matter of his allegedly perjurious testimony, the prosecution sought to obtain a grossly improper evidentiary advantage. Such an issue is absolutely prohibited in the absence of an issue as to intent or knowledge. *United States* v. *Deaton*, 381 F.2d 114, 117-118 (2d Cir., 1967); cf. *United States* v. *Freedman*, 445 F.2d 1220 (2d Cir., 1971); *Rules of Evidence for United States Courts and Magistrates*, Rule 4 (b).

As noted *supra*, the prosecutor, in his summation, repeatedly utilized the fact of the defendant's status in the prior prosecution as being a basis upon which the jury could find that the defendant was motivated to testify falsely. This is nothing more than bootstrap reasoning which, if approved, places within the power of the prosecutor the ability to degrade the credibility of any target by means of successive substantive and perjury prosecutions.

The vice of such a rationale is well described in *Harrell* v. *United States*, 220 F.2d 516 (5th Cir., 1955). In that case, a *witness* in a criminal prosecution was later, himself, prosecuted for perjury. On appeal, he claimed prejudice based upon the admission of evidence from the prior trial. In rejecting his contention, the Court of Appeals analyzed the situation as follows:

> "Appellant then makes the point that if the issue of materiality of the alleged perjury is for the court and not for the jury, as we have ruled, it was error for the trial court to allow Blackwell's testimony to be read to the jury. If the testimony taken at the former trial was relevant on the trial for perjury only for the purpose of determining the materiality of the alleged perjured testimony, appellant's point might be well taken. It would seem that if the question of materiality is for the court alone, then the question should be resolved on testimony submitted outside the presence of the jury. But the relevancy of the testimony taken at the trial at which perjury is alleged to have been committed is not limited to question [sic] of materiality alone. Luse v. United States, 9th Cir., 49 F.2d 241. In order to prove perjury, the prosecution must show that the testimony was willfully given, and willfulness is a question for the jury. Only by a full understanding of the issue on trial at the time the alleged perjury was committed can the jury determine the willfulness

> of the defendant in giving his testimony. One way to prove these issues, subject to the discretion of the trial court, is by the transcript of the testimony taken at that trial. *It is true that in cases where the defendant in perjury was himself the defendant in the former trial, the admission of testimony taken at the former trial may introduce into the trial of the perjury charges highly prejudicial evidence tending to show the commission of other crimes.* But such is not the case here. Harrell was not a defendant at the trial at which his perjury was committed. *Moreover, the testimony of Blackwell given therein in no way connects Harrell with violations of the law or otherwise reflects prejudicially upon him.* * * * " 220 F.2d at 520. [Emphasis added].

See also: *Gebhard* v. *United States*, 422 F.2d 281, 289 (9th Cir., 1970); *United States* v. *Freedman, supra.*

Beyond any doubt, the fact that the defendant had been *accused* of a different crime, but of the same nature as the transaction underlying the allegedly perjurious testimony, should not have been revealed to the trial jury, and that revelation requires a reversal of the defendant's conviction.

C. The Prosecutor Unfairly Placed His Own Credibility in Issue and Vouched for the Credibility of the Prosecution Witnesses.

As noted *supra*, pp. 34-35, the prosecutor claimed in summation that the prosecution witnesses should be believed because "they were not involved in the prior case. They were not the subject of investigation . . . " and had "no criminal record, no prior involvement with the law" (A. 1145-6). There is no record support whatsoever as regards the question of whether the prosecution witnesses had any criminal record or any involvement with the law or were the subjects of investigation. Moreover, it was absolutely

improper for the prosecutor, in his summation, to assert that the "truth" was the version of events claimed by the prosecution witnesses. (*Supra*, p. 35; A. 1124). Although defense counsel moved for a mistrial and, alternatively, for a remedial instruction, with regard to these improper prosecution arguments, the Trial Court summarily denied the motion. (A. 1146, 1154, 1164).

This Court has made abundantly clear that when a prosecutor expresses his personal belief in the guilt of the appellant or as to the truth of the testimony of prosecution witnesses, the defendant is deprived of a fair trial and his conviction must be reversed. The same rule applies when the prosecutor argues facts not in evidence. *United States* v. *Drummond*, 481 F.2d 62 (2d Cir., 1973); see also: *United States* v. *Bivona*, 487 F.2d 443 (2d Cir., 1973); *United States* v. *White*, 486 F.2d 204 (2d Cir., 1973); *United States* v. *LaSorsa*, 480 F.2d 522 (2d Cir., 1973).

D. The Prosecutor Violated the Defendant's Right Against Self-Incrimination by Drawing Attention to and Attempting to Capitalize upon the Failure of the Defendant to Testify in His Own Behalf.

We have set out, *supra*, at p. 35, the remarks of the prosecutor, in summation, in which he argued that the government's witnesses had not been "contradicted in any way whatsoever", and his repeated references to the witnesses "who testified here in front of you" and "who testified here". Defense counsel's motions for a mistrial and for a curative instruction were summarily denied by the Court (A. 1154).

In *United States* v. *Dioguardi*, 492 F.2d 70, at 81 (2d Cir., 1974), this Court held:

> "It is true that it has been frequently held impermissible for the prosecution to comment on a defendant's failure to call witnesses where only the defendant could offer counter-testimony or where the jury will 'naturally and necessarily' interpret this as

a comment upon the defendant's silence, otherwise constitutionally protected. *See*, e.g., *United States* v. *Lipton*, 467 F.2d 1161 (2d Cir., 1972); *United States* v. *Flannery*, 451 F.2d 880 (1st Cir., 1971); *United States* v. *Handman*, 447 F.2d 853 (7th Cir., 1971); *Desmond* v. *United States*, 345 F.2d 225 (1st Cir., 1965).

"However, this danger can be neutralized by a prompt corrective instruction to the jury. Such an instruction was given by Judge Edelstein. Moreover, this was not the close situation in which it was a question of a defendant's word against the word of one other (cf. *Handman*, where the defendant was implicated solely by an informer's testimony about a telephone conversation between himself and the defendant). * * * "

Unlike the situation in *Dioguardi, supra*, the Trial Judge herein refused to give a curative instruction. Additionally, this case did involve "the close situation in which it was a question of a defendant's word against the word of one other". *United States* v. *Dioguardi, supra.*

In *United States* v. *Handman*, 447 F.2d 853 (7th Cir., 1971), referred to in *Dioguardi, supra*, the Court reversed and remanded for a new trial, setting forth the facts and a detailed analysis of the problem:

"In argument to the jury the government noted that the case against Handman turned upon Solomon's testimony. There was other incriminating evidence, but Solomon's testimony of the telephone conversation with the defendant tied Handman to the offense charged. And there is nothing in this record to show that anybody but Handman could have challenged or contradicted Solomon's vital testimony. *Desmond* v. *United States*, 345 F.2d 225 (1st Cir., 1965); see: *United States* v. *Poole*, 379 F.2d 645, 649 (7th Cir., 1967). A cautionary in-

> struction should have been given by the Court promptly to erase any prejudice harbored by the jury because of Handman's failure to challenge or contradict Solomon's testimony. Id. 345 F.2d at 226-227; see: *Rodriguez-Sandoval* v. *United States,* 409 F.2d 529, 530 (1st Cir., 1969). The general instruction given at the close of the evidence would most likely be ineffective for that purpose." 447 F.2d at 855.

It is respectfully submitted that the prosecutor's comments in summation were none other than an attempt to draw the jury's attention to the failure of the defendant to testify, and a request that they take that into consideration in arriving at the determination of a verdict. For that reason, alone, the judgment of conviction ought be reversed.

POINT III

The District Court was without authority to direct that, as a condition of probation, the defendant is to pay $5000 to the Department of Interior.

The defendant was convicted of making false declarations in a Court proceeding, in violation of 18 U.S.C. § 1623. That statute provides that, in the event of a conviction, the defendant, "shall be fined not more than $10,000 or imprisoned not more than five years, or both."

In the present case, the Court pronounced sentence as follows:

> "Defendant is placed on unsupervised probation for a period of one year, upon *condition that he pay the sum of $5000 to the Department of the Interior, which shall be used in connection with the preservation of endangered species,* payment to be arranged by the probation department." [Emphasis added]. (A. 1294; *see also Judgment* at A. 1302).

18 U.S.C. § 3651 sets forth the powers of the federal courts with regard to the suspension of sentence and the imposition of probation, as well as the conditions which may be imposed thereon. The statute provides, in pertinent part, as follows:

> "Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any Court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the Court deems best.
>
> * * * * *
>
> "Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the Court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of expressed limitation, shall extend to the entire sentence and judgment.
>
> "The Court may revoke or modify any condition of probation, or may change the period of probation.
>
> "The period of probation together with any extension thereof, shall not exceed five years.
>
> "While on probation and among the conditions thereof, the defendant—
>
> May be required to pay a fine in one or several sums; and
>
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and
>
> May be required to provide for the support of any persons, for whose support he is legally responsible.
>
> * * * * *

> The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation."

The above quoted statute is the sole source of the probation power of the federal courts, and it specifically circumscribes that power. *United States* v. *Ellenbogen,* 390 F.2d 537 (2d Cir., 1968). *See also; United States* v. *Murray,* 275 U.S. 347, 354 (1928) and *United States* v. *Benz,* 282 U.S. 304, 306-7 (1931).

The five thousand dollars ($5000) payment imposed herein was certainly not a fine; it was not denominated as such nor was it made payable to the clerk of the court. It is nothing less than a forced philanthropic contribution intended to be administered by the Department of the Interior for the preservation of wild animals.

Failing to find any lawful basis for the imposition of the condition in question, we can only speculate that the Court had in mind the second of three probation conditions specified by the statute wherein a defendant "may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." It is readily observed that this provision requires that three independent circumstances must each be present in order for the conditions of restitution or reparation to be imposed:

1. There must be "an aggrieved party". The status of an aggrieved party must be certain and he must have been directly and financially aggrieved by the defendant's act. *United States* v. *Hoffman,* 415 F.2d 14, 21-22; *United States* v. *Follette,* 32 F. Supp. 953 (E.D. Pa., 1940). Neither the Department of the Interior nor the endangered wild animals can reasonably be construed to fall within the meaning of "aggrieved party".

2. Restitution is to be made in an amount representing "actual damages or loss" of an aggrieved party. If there is no such damage or loss, the condition is invalid. *Karrell* v. *United States*, 181 F. 981, 986-7 (9th Cir., 1950); *United States* v. *Hoffman, supra; United States* v. *Follette, supra.*

3. The actual damage or loss must be "caused by the offense for which conviction was had." The defendant was convicted of making false statements in a court proceeding. No person nor property was directly or indirectly harmed by the defendant's testimony.

It can thus be seen that each of the three prerequisites to the imposition of restitution or reparation is absent in the present case. Since the condition in question is not authorized by 18 U.S.C. § 3651, it should be ordered stricken from the judgment.

CONCLUSION

For all of the above reasons, the judgment of conviction should be reversed, and the indictment should be dismissed.

Respectfully submitted,

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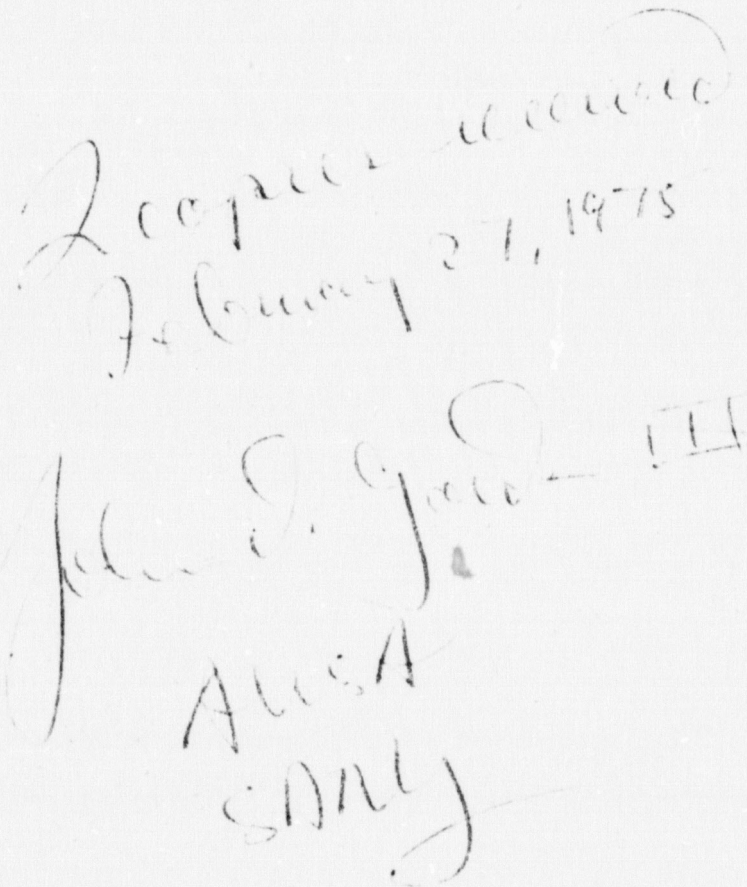

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